(8)

No. 95-928

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN W. ATHERTON, JR., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR CITY SAVINGS, F.S.B.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

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QUESTION PRESENTED

Whether Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. 1821(k), eliminated the right of the Federal Deposit Insurance Corporation, as receiver, to assert a federal savings association's federal common-law claims against a former officer and director of the association.

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Cases—Continued: Page

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FSLIC v. *Kidwell*, 716 F. Supp. 1315 (N.D. Cal. 1989), vacated in part, 937 F.2d 612 (9th Cir. 1991) 14
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Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) 11-12
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Pt. 544 17
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Federal Home Loan Bank Board, Memorandum R-62, *Accountability of Directors and Officers; Policy Statement*, 52 Fed. Reg. 22,682 (1987) 25
H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. (1989) 41
Office of the Comptroller of the Currency, *The Director's Book* (Aug. 1987) 26
Office of Thrift Supervision, *Director Information Guidelines* (1989) 25
Office of Thrift Supervision, *Regulatory Handbook on Thrift Activities* (1990) 25
Office of Thrift Supervision, *Statement Concerning the Responsibilities of Directors and Officers of Insured Depository Institutions* (1992) 25
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Fletcher Cyclopedia of the Law of Private Corporations (1994):

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S. Rep. No. 19, 101st Cong., 1st Sess. (1989) 37, 39, 40

Ronald W. Stevens & Bruce H. Neilson, *The Standard of Care for Directors and Officers of Federally Chartered Depository Institutions: It's Gross Negligence Regardless of Whether § 1821 (k) Preempts Federal Common Law*, 13 Ann. Rev. Banking, L. 169 (1994) 14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A50) is reported at 57 F.3d 1231. The opinion of the district court (Pet. App. A65-A67) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A51-A53) was entered on June 23, 1995. A petition for rehearing was denied on September 14, 1995. Pet. App. A54-A56. The petition for a writ of certiorari was filed on December 12, 1995, and granted on April 15, 1996 (116 S. Ct. 1415). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1821(k), provides in relevant part as follows:

> A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by * * * the [Federal Deposit Insurance] Corporation * * * for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the [Federal Deposit Insurance] Corporation under other applicable law.

Section 212(a) of FIRREA, 12 U.S.C. 1821(d)(2)(a), provides in relevant part as follows:

> The [Federal Deposit Insurance] Corporation shall, as conservator or receiver, and by operation of law, succeed to * * * all rights, titles, powers, and privileges of the insured depository institution * * *.

STATEMENT

1. City Federal Savings Bank (City Federal) was a federally chartered, federally insured savings bank located in Bedminster, New Jersey. On December 7, 1989, the Director of the Office of Thrift Supervision (OTS) declared City Federal insolvent and appointed the Resolution Trust Corporation (RTC) as its receiver. Under 12 U.S.C. 1821(d)(2)(A), the RTC succeeded to all of City Federal's rights, titles, powers, and privileges.[1]

[1] The RTC was vested with "the same powers and rights to carry out its duties with respect to institutions" for which it was appointed as conservator or receiver as the Federal Deposit Insurance Corporation (FDIC) has under Sections 1821, 1822, and 1823 of Title 12. 12 U.S.C. 1441a(b)(4).

Through a series of transactions, City Federal's assets (including any civil claims for monetary damages that City Federal may have had against any of its former officers or directors) were transferred to a newly chartered federal savings bank, City Savings, F.S.B., which, on January 11, 1991, was itself subject to an RTC receivership.

In its capacity as receiver for City Federal and its successors in receivership and conservatorship, the RTC filed suit against several of City Federal's former directors and officers, including petitioner (who was throughout the relevant period a director and, at various times, chief operating officer, chairman, president, and chief executive officer of City Federal). See generally C.A. J.A. A12-A55 (First Amended Complaint). The complaint, based on federal common law and state statutory and common law, alleged breach of fiduciary duty, negligence and gross negligence. *Id.* at A54; Pet. App. A11. The RTC asserted that the defendants had failed to exercise appropriate care in their consideration, approval, and oversight of several large acquisition, development, and construction loans that ultimately defaulted, resulting in losses to City Federal of more than $100 million. Pet. App. A11.

The district court granted petitioner's motion to dismiss. Pet. App. A57-A64. The court accepted petitioner's view—in which the RTC concurred—that, because City Federal was a federally chartered institution, federal law must govern its internal affairs, including the standard of care that determined its officers' and directors' liability. *Id.* at A61. The court then held that Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1821(k), which authorizes suit by the federal receiver for gross negligence, provides the exclusive federal-law standard of liability, supplanting the RTC's right to proceed under the federal common-law standard that would

have applied in a suit brought by City Federal on its own behalf prior to the receivership. Pet. App. A61-A64.

Upon the RTC's request, the district court certified for interlocutory appeal its order dismissing the RTC's complaint. Pet. App. A66.[2] The court of appeals granted the RTC's petition for interlocutory review, *id.* at A68, and consolidated the appeal with an interlocutory appeal that had been filed by other defendants in an unrelated suit brought by the RTC as receiver for United Savings and Loan of Trenton, New Jersey (United Savings). Because United Savings was a state-chartered institution, the negligence and breach of fiduciary duty claims that the RTC asserted against the officers and directors in that case were based on New Jersey law. *Id.* at A9-A10. The district court in the *United Savings* case had rejected the defendants' argument that Section 1821(k) preempted the RTC's ability to assert state-law claims that United Savings could itself have asserted before going into receivership. *Id.* at A10.

2. The court of appeals reversed the district court's order dismissing the RTC's federal common-law claims against petitioner and the other City Federal defendants, and affirmed the district court's refusal to dismiss the RTC's state-law claims against the United Savings defendants. Pet. App. A1-A37. It rejected the conclusion that Congress intended Section 1821(k) to be the exclusive civil remedy in suits by the RTC, as receiver, against officers and directors of federally insured depository institutions. The court interpreted Section 1821(k) as establishing a minimum standard of liability for suits by the federal receiver that ensures its ability, irrespective of any limitations in the law of the chartering authority, to recover for damages caused by the gross negligence (or even more culpable conduct) of officers or directors of federally insured institutions.

[2] At the same time, the court permitted the RTC to file an amended complaint adding statutory claims for gross negligence under Section 1821(k).

The court of appeals began with the observation that the RTC, as receiver, was entitled to succeed to all of the rights that City Federal had itself possessed, including the right to assert claims sounding in federal common law against City Federal's officers and directors. Pet. App. A28.[3] In the court's view, Section 1821(k) did not disturb that right. Looking to the text of the statute, the court read the last sentence of Section 1821(k) (the savings clause) to preserve the federal receiver's ability to seek recovery under "*all* 'other applicable law,' including the less forgiving negligence and fiduciary duty standards of care under state law and federal common law." *Id.* at A13. It rejected petitioner's suggestion that, insofar as federal law is concerned, "other applicable law" refers only to the administrative remedies available to regulators under FIRREA. *Id.* at A14.

The court's interpretation of Section 1821(k) as establishing a minimum standard for officer and director liability to the federal receiver was, in its view, consistent with Congress's modest goal (as revealed by the legislative history of Section 1821(k)) "to ensure that directors and officers of state-chartered institutions * * * not escape liability to the RTC under the shield of certain state laws that had effectively insulated them even from claims based on their grossly negligent or reckless conduct." *Id.* at A23; see also *id.* at A30 (Congress intended to "address the question of what standard should apply in cases where the RTC was confronted with an applicable state insulating statute, * * * *not* * * * to define the standard of care applicable to federally chartered institutions governed by federal common law.").

The court of appeals reserved judgment as to the content of the federal common-law standard (*i.e.*, whether it is one of ordinary or gross negligence). Pet. App. A32

[3] The court stated its understanding that "federal law exclusively governs [cases involving the liability of directors and officers] when the institution is federally chartered, like City Federal." Pet. App. A10 n.5.

n.16, and directed the district court on remand "to permit the RTC to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law," *id.* at A37.[4]

Judge Mansmann concurred in part and dissented in part. Pet. App. A38-A50. She agreed with the majority that the power accorded the federal receiver in Section 1821(k) to pursue claims for gross negligence does not bar the federal receiver from asserting a state-chartered institution's own state-law claims sounding in ordinary negligence or breach of fiduciary duty against its former officers and directors, *id.* at A38, but she concluded that Section 1821(k) does establish an exclusive gross-negligence standard for suits by the federal receiver against officers and directors of federally chartered institutions, *id.* at A50.

On December 31, 1995, the RTC terminated, in accordance with the provisions of the Resolution Trust Corporation Completion Act, 12 U.S.C. 1441a(m)(1). The RTC was succeeded in its capacity as receiver by the Federal Deposit Insurance Corporation (FDIC). 12 U.S.C. 1441a(b)(4)(A).[5]

[4] In light of the court's conclusion that Congress had no intention of altering the rights of the federal receiver *vis a vis* officers and directors of federally chartered depository institutions, it held that Section 1821(k) does not apply at all to suits by the federal receiver against such officers or directors. In the court's view, the RTC therefore could not assert gross-negligence claims under Section 1821(k) against petitioner or the other City Federal defendants. Pet. App. A37 n.17. Congress does appear to have been motivated by, and to have focussed exclusively on, problems peculiar to suits by the federal receiver against officers and directors of state-chartered, federally insured depository institutions. See generally pp. 36-41, *infra*. We nevertheless agree with petitioner (Pet. Br. 22-24) that the language of Section 1821(k) encompasses suits by the federal receiver against officers and directors of both federally and state-chartered institutions. ("Insured depository institution" means "any bank or savings association the deposits of which are insured by the [FDIC]," 12 U.S.C. 1813(c)(2); "bank" includes both state banks and national banks, 12 U.S.C. 1813(a)(1)(A); and "savings association" includes both federal savings associations and state savings associations, 12 U.S.C. 1813(b)(1).) We believe, accordingly, that the FDIC may bring a suit under Section 1821(k)'s gross-negligence standard against the officers or directors of a federally chartered institution such as City Federal.

SUMMARY OF ARGUMENT

I. Petitioner maintained in district court that, because City Federal operated under a federal charter, the standard of liability applicable to its officers and directors was necessarily a matter of federal, not state, law. In his petition for certiorari, he asked this Court to consider whether 12 U.S.C. 1821(k), which authorizes the FDIC to sue for gross-negligence, supplants the FDIC's right, as receiver, to assert against him any federal common-law claims for ordinary negligence that City Federal might have been able to pursue against him on its own behalf. In his merits brief, however, petitioner argues that City Federal could not itself have sued him for ordinary negligence under federal common law, because (he now contends) the standard of liability for officers and directors of federally chartered depository institutions is governed by state, not federal, law. Because the petition for certiorari did not question the decision below that federal common law governs the liability of officers and directors of federal depositories to their own institutions, this Court may not wish to address that issue. If the Court does address the issue, it should reject petitioner's new-found argument that state law governs the internal affairs of federally chartered institutions.

A corporation is a creature of the law under which it is chartered. Matters pertaining to the internal affairs of a state-chartered corporation—those matters affecting the relationships among or between its directors, officers and shareholders—are therefore governed by the law of the State of incorporation. Federal savings associations and national banks, however, are entirely creatures of federal

[5] For simplicity's sake, we refer to the federal receiver uniformly hereafter as the FDIC.

law; they are federally chartered, federally organized, and federally regulated. For that reason, it is the law of the United States, not the law of any particular State, that governs their internal affairs.

Federal common law will, in some circumstances, incorporate state law as the applicable rule of decision. Here, however, federal law itself provides the appropriate substantive standards. The chartering authority for federal savings associations, the OTS, is authorized, after notice and a hearing, to assess civil monetary penalties against and/or remove from office directors and officers of federal savings associations for, *inter alia*, breach of fiduciary duties. In the course of agency adjudications, the OTS has authoritatively spoken to the fiduciary duties owed by officers and directors to federal thrifts, and has concluded that that duty is one of ordinary care. The courts should look to the degree of care demanded by the OTS, and to the OTS's specification of the functional responsibilities of officers and directors, in civil actions against officers or directors brought by or on behalf of federal thrifts. The alternative—application of various state-law formulations—would subject officers and directors to multiple and possibly conflicting standards of conduct and thereby undermine the OTS's ability to implement a coherent and uniform regulatory policy.

II. By virtue of 12 U.S.C. 1821(d)(2)(A)(i), the FDIC as receiver steps into the shoes of a failed federally insured depository institution and succeeds as a matter of law to all of that institution's rights, titles, powers and privileges, including any civil claims that it might possess against its former officers and directors. Section 1821(k) of Title 12 authorizes the FDIC to pursue claims against former officers and directors of failed federally insured depository institutions "for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence)." Its savings clause provides that that authorization shall not "impair or affect any right of the [FDIC] under other

applicable law." *Ibid.* In our view, Section 1821(k) means precisely what it says: The FDIC has the right to sue for gross negligence (or more culpable conduct), irrespective of whether the failed institution itself had that right under applicable law; the FDIC also has the right to pursue whatever claims the failed institution could itself have pursued under other applicable law (including federal common law).

The legislative history of Section 1821(k) confirms this interpretation of the text. That history demonstrates that Congress intended through Section 1821(k) to expand, not limit, the FDIC's rights. Congress authorized the FDIC to sue for gross negligence in order to preempt state statutes that would otherwise limit the FDIC, in its capacity as receiver for state-chartered institutions, to suits for reckless or intentional misconduct. There is no indication in the legislative history of any congressional intention to create an exclusive gross-negligence standard of liability for officers and directors of federally chartered depository institutions or (more generally) to eliminate the FDIC's established right to pursue any claims to which it might succeed as receiver.

ARGUMENT

I. THE STANDARD OF LIABILITY APPLICABLE IN A SUIT AGAINST AN OFFICER OR DIRECTOR OF A FEDERALLY CHARTERED SAVINGS ASSOCIATION FOR BREACH OF DUTY TO THE ASSOCIATION IS GOVERNED BY FEDERAL LAW

Petitioner conceded—indeed affirmatively maintained—in the district court that the standard of liability in a suit brought by City Federal against its directors and officers would have been determined exclusively by federal law. Brief of Defendants John W. Atherton, Jr., et al., in Support of Their Motion To Dismiss the Amended Complaint of Plaintiff Resolution Trust Corporation at 11-17; see *id.* at 16-17 ("[B]ecause City Federal was a federally

chartered savings institution subject to plenary federal regulation, the liability of the Directors, if any, to the [FDIC] as receiver for City Federal must be determined solely in accordance with applicable federal law."); see also Brief of Defendants John W. Atherton, Jr., et al., in Reply to the RTC's Opposition to Motion to Dismiss at 1-2 ("[S]tate law is inapplicable to the internal affairs of a federally chartered thrift, like City Federal, including the issue of the scope of a director's liability to such institution."). The FDIC concurred in that view. C.A. J.A. A67-A68. Petitioner and the FDIC disagreed in the district court only with regard to petitioner's assertion that, as to suits by the federal receiver, 12 U.S.C. 1821(k) created an exclusive gross-negligence standard of liability that supplanted the FDIC's right to rely on the standard of liability applicable under federal common law. Pet. App. A63-A64.

The court of appeals also understood petitioner to concede "that before receivership City Federal * * * had a right to bring an action against [him] under federal common law." Pet. App. A28. The questions that petitioner presented to this Court in his petition for certiorari addressed only whether Section 1821(k) supplanted any applicable federal common-law standard of liability in suits by the FDIC as receiver against officers and directors of federally chartered depository institutions.[6]

[6] Although petitioner voiced doubt in a footnote as to whether there was a federal common law of officer and director liability prior to the enactment of FIRREA (Pet. 19 n.6), he presented only the following questions for review:

> 1. Whether Section 1821(k) supplants "federal common law" and constitutes the exclusive standard of liability in a civil damage action brought by the Resolution Trust Corporation (the "RTC") against the former officers and directors of a failed federally chartered FDIC insured savings bank.
>
> and
>
> 2. Whether the court of appeals erred in concluding that Section 1821(k)—a *federal* statute expressly made applicable to actions against officers or directors of *"any"* FDIC insured bank or savings association, without regard to where it is chartered—has *no* application whatsoever to RTC actions against officers and directors of failed *federally* chartered FDIC insured institutions, and that the liability of officers and directors of such institutions is instead governed exclusively by "federal common law."

See Pet. i-ii.

In his brief on the merits, however, petitioner presents a new question: "Whether, even if § 1821(k) does not supplant federal common law, federal courts are nevertheless precluded from applying any federal common law standard of liability to the conduct of directors and officers of federally chartered depository institutions in light of *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994)." See Pet. Br. i. Petitioner now argues (*id.* at 32-48)—in diametric opposition to his position in the district court—that it is state law that governs the liability of officers and directors to federally chartered depository institutions.[7]

This Court ordinarily will consider "[o]nly the questions set forth in the petition, or fairly included therein." *Caspari* v. *Bohlen*, 114 S. Ct. 948, 952 (1994) (quoting Sup. Ct. R. 14.1(a)); *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U.S. 175, 179 (1938). The Court will consider an issue first raised in a merits brief "only in the most exceptional cases." *Izumi Seimitsu*

[7] This Court's intervening decision in *O'Melveny* does not justify petitioner's change in position. In that case, the Court rejected the FDIC's argument that its interest as insurer of deposits justified the creation of a new federal common-law rule in a state-law action brought by the FDIC as receiver of a state-chartered thrift. Petitioner's argument in the district court regarding the exclusive applicability of federal-law standards of liability in suits by the federal receiver against officers and directors of federally chartered institutions had nothing to do with the FDIC or its interests as insurer. Rather, petitioner argued that federal, not state, law governs the internal affairs of institutions that operate under a federal charter.

Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 114 S. Ct. 425, 427 (1993) (per curiam).

This is not such an exceptional case. So long as this Court accepts, or assumes for purposes of this case, that federal law governs the internal affairs of a federally chartered depository institution (including the standard of liability that applies in a suit by the institution against its own officers and directors)—an almost tautological proposition that petitioner himself advanced before the district court—the Court may reach and decide the questions presented in the petition. For these purposes, the Court need not consider (nor make any assumptions respecting) the source or content of the federal common-law standard, an issue that the court of appeals directed the district court to consider on remand. See Pet. App. A37. If the Court reaches that issue, however, we think it clear that, in a civil suit by a federally chartered depository institution against its officers and directors, the standard of liability is appropriately drawn from the fiduciary standards applied by the federal chartering authority, rather than from state corporation law.

A. The Duties Owed By Officers And Directors To Federally Chartered Depository Institutions Are A Matter Of Federal Law

This Court recognized more than one hundred years ago that, in addition to the specific statutory obligations set forth in the National Bank Act, officers and directors of national banks owe their institutions fiduciary duties of loyalty and care derived from and enforceable under common law. See *Briggs* v. *Spaulding*, 141 U.S. 132, 146-147 (1891); see also *Yates* v. *Jones Nat'l Bank*, 206 U.S. 158, 178 (1907) ("[T]he statute does not relieve the directors from the common law duty to be honest and diligent."); *Bowerman* v. *Hamner*, 250 U.S. 504, 510-511 (1919) ("While the statute furnishes the exclusive rule for determining whether its provisions have been violated or not, this does not prevent the application of

the common-law rule for measuring violations of common law duties."). The Court further explained that, under the common law, "directors must exercise ordinary care and prudence in the administration of the affairs of a bank." *Briggs*, 141 U.S. at 165, *i.e.*, that degree of care "which ordinarily prudent and diligent men would exercise under similar circumstances," *id.* at 152.[8] The Court did not attempt to define with "precision the degree of care and prudence which [such] directors must exercise in the performance of their duties," observing, rather, that "each case has to be determined in view of all the circumstances." *Id.* at 147, 152. The ordinary-care formulation articulated by this Court in *Briggs* is still regarded as the "classic statement of the standard of care for bank directors." 3A James Solheim & Kenneth Elkins, *Fletcher Cyclopedia of the Law of Private Corporations* § 1042.10, at 76 (1994) (*Fletcher Cyc. Corp.*); *id.* § 1084, at 147.

Briggs was decided before *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). It involved the application of "general" common law. Because the standard of care owed a bank by its directors and officers was derived from common-law principles of universal application, *Briggs*, 141 U.S. at 146; *id.* at 147-152 (relying upon established federal, state, and English common-law authority), the drafters of the National Bank Act in 1864 would have felt no need expressly to define it in the statute. At that time, it would have been assumed that officers' and directors' fiduciary duties to national banks arose as a matter of law from Congress's creation of national banks in corporate form.

Although this Court in *Erie* subsequently repudiated the existence of "general" federal common law, *Erie* (a diversity case) had neither the "purpose [n]or effect [of]

[8] Accord *Bowerman*, 250 U.S. at 512 ("It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers.") (quoting *Martin* v. *Webb*, 110 U.S. 7, 15 (1884)).

broadening state power over matters essentially of federal character." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 307 (1947). The vast majority of courts that have considered the matter since *Erie* have recognized the essentially federal character of the rules governing the internal affairs of federally chartered depository institutions, and have concluded therefrom that the standard of care applicable in civil actions against officers and directors of federally chartered depository institutions is a matter of federal law.[9]

[9] See Ronald W. Stevens & Bruce H. Neilson, *The Standard of Care for Directors and Officers of Federally Chartered Depository Institutions: It's Gross Negligence Regardless of Whether § 1821(k) Preempts Federal Common Law*, 13 Ann. Rev. Banking L. 169, 173-174 (1994) (footnotes omitted) ("Before the adoption of FIRREA, a consensus existed among the federal courts that because federally chartered savings and loan associations were subject to comprehensive federal regulation 'from [their] corporate cradle to [their] corporate grave,' federal law alone governed their internal affairs, including the issue of officers' and directors' liability. Federal courts have affirmed that position since Congress adopted FIRREA."); *id.* at 174 nn.19-20 (citing *RTC* v. *Farmer*, 823 F. Supp. 302, 306 (E.D. Pa. 1993); *RTC* v. *Hess*, 820 F. Supp. 1359, 1363, 1367-1370 (D. Utah 1993); *RTC* v. *Gallagher*, 800 F. Supp. 595, 602 (N.D. Ill. 1992), aff'd, 10 F.3d 416 (7th Cir. 1993); *FSLIC* v. *Olano*, Civ. A. No. 86-472, 1989 WL 54226, at *1 (E.D. La. May 17, 1989); *Mortensen* v. *First Fed. Sav. & Loan Ass'n*, 79 F.R.D. 603, 612 (D.N.J. 1978); *Rettig* v. *Arlington Heights Fed. Sav. & Loan Ass'n*, 405 F. Supp. 819, 826 (N.D. Ill. 1975); *City Fed. Sav. & Loan Ass'n* v. *Crowley*, 393 F. Supp. 644, 655 (E.D. Wis. 1975); *Meyers* v. *Beverly Hills Fed. Sav. & Loan Ass'n*, 499 F.2d 1145 (9th Cir. 1974)); see also, *e.g.*, *RTC* v. *Chapman*, 29 F.3d 1120, 1122-1124 (7th Cir. 1994); *RTC* v. *Gladstone*, 895 F. Supp. 356, 363 (D. Mass. 1995); *RTC* v. *Camhi*, 861 F. Supp. 1121, 1126-1127 (D. Conn. 1994); *FDIC* v. *Bates*, 838 F. Supp. 1216, 1218 (N.D. Ohio 1993), rev'd in part and remanded, 42 F.3d 369 (6th Cir. 1994); *RTC* v. *Gibson*, 829 F. Supp. 1110, 1120 (W.D. Mo. 1993); *RTC* v. *Cooper*, No. 3:92-3368-17 (D.S.C. 1993); *FSLIC* v. *Kidwell*, 716 F. Supp. 1315, 1317 (N.D. Cal. 1989), vacated in part on other grounds, 937 F.2d 612 (9th Cir. 1991) (Table). As petitioner notes, a small number of courts have applied state law in these circumstances. See Pet. Br. 46-47; see also p. 35 n.31, *infra*.

1. It "is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares." *CTS Corp.* v. *Dynamics Corp.*, 481 U.S. 69, 91 (1987). Indeed, "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate [its] domestic corporations." *Id.* at 89. Thus, as a general rule, a corporation's internal affairs—those "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders"—are governed by the law of the State of incorporation. *Edgar* v. *MITE Corp.*, 457 U.S. 624, 645 (1982) (citing Restatement (Second) of Conflict of Laws § 302 (1971)).

In the choice-of-law context, one function of the internal-affairs doctrine is to ensure uniformity in the rules applicable to each corporation; "otherwise a corporation could be faced with conflicting demands." *MITE Corp.*, 457 U.S. at 645; see also Restatement (Second) of Conflict of Laws, *supra*, § 302, cmt. e ("Uniform treatment of directors, officers and shareholders is an important objective which can only be obtained by having [their] rights and liabilities * * * governed by a single law.").

The internal-affairs doctrine is also based on more fundamental concepts of sovereignty. "Being the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819). A State's regulation of the corporate governance of domestic corporations is, therefore, "regulation of entities whose very existence and attributes are a product of [that State's] law." *CTS Corp.*, 481 U.S. at 89; *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949) ("[T]he corporate entity * * * [is] a wholly artificial creation whose internal relations between management and stockholders are dependent upon [the incorporating] state['s]

law."). It follows that "the first place one must look to determine the powers of corporate directors is in the relevant State's corporation law," which is "the font of corporate directors' powers." *Burks* v. *Lasker*, 441 U.S. 471, 478 (1979). And it similarly follows that, because a suit brought by or on behalf of a state-chartered corporation against its officers or directors directly implicates the "allocation of governing powers within the corporation," *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101 (1991), the rules governing such actions are ones in which "the legislature of [that] state has wide [regulatory] powers," *Cohen*, 337 U.S. at 549.[10]

Federal savings associations, however, are wholly creatures of federal law. Under the Home Owners' Loan Act of 1933 (HOLA), ch. 64, 48 Stat. 128, 12 U.S.C. 1461 *et seq.*, Congress delegated to the Federal Home Loan Bank Board (FHLBB), now the OTS,[11] "broad authority to establish and regulate 'a uniform system'" of savings associations, "and to 'establish them with the force of the

[10] For that reason, in derivative suits brought on behalf of state-chartered corporations alleging violations of federal securities statutes, this Court has incorporated into the federal law the internal-affairs principles of the law of the chartering State. See, *e.g.*, *Kamen* v. *Kemper Fin. Servs., Inc.*, *supra*; *Burks* v. *Lasker*, *supra*; cf. *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 478-479 (1977) (Rule 10b-5, 17 C.F.R. 240.10b-5, does not apply in circumstances where its application would create a "federal fiduciary principle" regulating "transactions which constitute no more than internal corporate mismanagement"). The Court has demonstrated similar respect for the States' authority to govern the internal affairs of state-chartered corporations in cases raising constitutional or statutory preemption challenges. See, *e.g.*, *CTS Corp.* v. *Dynamics Corp.*, *supra* (state law regulating tender offers not preempted by Williams Act and not violative of Commerce Clause); *Cort* v. *Ash*, 422 U.S. 66 (1975) (no implied cause of action under federal election law, in part because recognition of implied cause of action would federalize duties of corporate directors); *Cohen* v. *Beneficial Indus. Loan Corp.*, *supra* (rejecting constitutional challenge to state law requiring shareholders to post security for derivative suit).

[11] With the enactment of FIRREA, the OTS succeeded to the authority and responsibilities of the FHLBB. 12 U.S.C. 1462a.

government behind them, with a national charter." *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 166 (1982). The OTS is charged with providing for the "organization, incorporation, examination, operation, and regulation" of federal savings associations, "giving primary consideration [to] the best practices of thrift institutions in the United States." 12 U.S.C. 1464. Pursuant to that mandate, the FHLBB and the OTS have "regulat[ed] comprehensively the operations of these associations," *de la Cuesta*, 458 U.S. at 166-167, "governing 'the powers and operations of every Federal savings and loan association from its cradle to its corporate grave,'" *id.* at 145. See 12 C.F.R. Pt. 541.[12]

National banks also operate under a federal charter. Their formation, corporate organization, and powers are provided for under Chapter 2 of the National Bank Act. 12 U.S.C. 21-43. They have long been considered "instrumentalities of the Federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States," *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); accord *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373, 375 (1954); *Easton* v. *Iowa*, 188 U.S. 220, 230 (1903); *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 33-34 (1875). The National Bank Act directly controls certain aspects of national banks' corporate governance (*e.g.*, 12 U.S.C. 61 (shareholder voting), 71 and 72 (directors' qualifications), and 74 (vacancies)), and, pursuant to his authority under 12 U.S.C. 93a, the Comptroller of the Currency has promulgated detailed regulations governing their corporate practices, see 12 C.F.R. 7.2000-7.2024.[13] The States have the power to regulate

[12] OTS regulations comprehensively govern the incorporation and organization of federal savings associations, providing charter and bylaw forms that may be modified only with the consent of the OTS. See 12 C.F.R. Pts. 543, 544, 552.

[13] As to certain matters, the Comptroller has chosen to incorporate state law to fill regulatory gaps, authorizing national banks,

national banks "only with the consent, express or implied, of Congress," *Farmers' & Mechanics' Nat'l Bank*, 91 U.S. at 34-35,[14] and, while national banks are (by implied consent) ordinarily subject to the operation of general state laws in their dealings and contracts with third parties, *McClellan* v. *Chipman*, 164 U.S. 347, 356 (1896), this Court has never suggested that state law controls matters relating to their internal corporate governance.[15]

Just as the internal affairs of a state-chartered corporation are governed by the law of the chartering State, so federal law governs the internal affairs of federally chartered institutions.[16] See, *e.g.*, *RTC* v. *Chapman*, 29 F.3d

"[t]o the extent not inconsistent with applicable Federal banking statutes or regulations, or bank safety and soundness, * * * to follow the corporate governance procedures of the law of the state in which the main office of the bank is located, the law of the state in which the holding company of the bank is incorporated, the Delaware General Corporation Law, * * * or the Model Business Corporation Act." 12 C.F.R. 7.2000(b).

[14] Congress has, in certain instances, expressly subjected national banks to restrictions that apply to state-chartered banks under state law. See, *e.g.*, 12 U.S.C. 36(c) (establishment of branch banks); 12 U.S.C. 85 (maximum interest rates); 12 U.S.C. 90 (security for the deposit of state funds).

[15] Petitioner's contrary reliance (Pet. Br. 47) on *Wichita Royalty Co.* v. *City National Bank*, 306 U.S. 103 (1939), and *California Federal Savings & Loan Association* v. *Guerra*, 479 U.S. 272 (1987), is misplaced. The claims in both of those cases were asserted by third parties. In *Wichita Royalty*, a depositor asserted a tort claim for individual relief against the bank's directors. *Guerra* involved a statutory claim brought against the savings association by a former employee.

[16] Federal credit unions also operate under federal charters, and their creation, corporate organization, and corporate powers are provided for by federal law. See, *e.g.*, 12 U.S.C. 1757 (corporate powers), 1758 (bylaws), 1761b (board of directors' meetings, powers, and duties). The National Credit Union Administration, an independent executive branch agency, is charged, *inter alia*, with issuing their charters and regulating their corporate practices. 12 U.S.C. 1752a. See generally 12 C.F.R. Pt. 701 (regulations governing organization and operation of federal credit unions).

1120, 1123 (7th Cir. 1994) (Easterbrook, J.) ("[The failed institution] held a federal charter, so national law governs the liability of officers and directors for their management."); *Murphy* v. *Colonial Fed. Sav. & Loan Ass'n*, 388 F.2d 609, 611-612 (2d Cir. 1967) (When state courts "deal with the internal affairs of federal savings and loan associations, * * * they are nonetheless applying federal law."); *RTC* v. *Farmer*, 823 F. Supp. 302, 307 (E.D. Pa. 1993) ("[T]he court does not reach the issue of whether Pennsylvania liabilty standards allow claims for simple negligence (and/or for breach of fiduciary duty) since the bank is federally chartered and is not incorporated under and regulated by state law."); *RTC* v. *Hess*, 820 F. Supp. 1359, 1362 (D. Utah 1993) ("Federal savings and loan institutions are federally chartered, federally regulated, federally insured, and federally organized. Such comprehensive coverage leaves little or no room for state law claims."); *RTC* v. *Gallagher*, 800 F. Supp. 595, 602 (N.D. Ill. 1992) ("[The institutions] were federally chartered, federally regulated, federally insured thrifts which were organized under federal law. * * * As a result, there is no basis for any state law claims in this case. Therefore, all claims will be construed as arising under federal law."), aff'd, 10 F.3d 416 (7th Cir. 1993).

2. The conclusion that federal law governs the duty of care owed by officers and directors to their federally chartered depository institutions is also supported by this Court's decision in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In that case, the United States had lent money and obtained contractual security interests through federal programs administered by the Small Business Administration (SBA) and the Farmers Home Administration (FmHA). The primary question was whether the priority of the government's liens as against competing private liens was governed by state or federal law. This Court thought it "clear that the priority of liens stemming from federal lending programs must be

determined with reference to federal law." *Id.* at 726.[17] In reaching that conclusion, the Court observed that, "[s]ince the [SBA and FmHA] derive their authority to effectuate loan transactions from specific Acts of Congress passed in the exercise of a 'constitutional function or power,' their rights, as well, should derive from a federal source." *Ibid.* (citation omitted). See also *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 366 (1943) (citations omitted) (Where the United States' "authority to issue [a] check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of * * * any * * * state[,] [t]he duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.").[18]

Those principles apply with equal if not greater force in this case. National banks and federal savings associations are instrumentalities of the United States created for a public purpose. Their authority derives "from specific Acts of Congress passed in the exercise of a 'constitutional function or power.'" *Kimbell Foods,* 440 U.S. at 726. Their rights, duties, and powers and those of their constituent parts—their officers, directors and shareholders—derive wholly from federal statutes and are "in no way dependent" on the laws of any State. *Clearfield Trust,* 318 U.S. at 366. Moreover, while both *Kimbell Foods* and *Clearfield Trust* pitted the interests of the United States against the interests of third parties, matters of corporate governance (such as the standard of care owed by officers and directors) implicate only the competing interests of principals within federal depository institutions. The law of the United States, not any State's law, governs the internal affairs of those institutions.

3. Contrary to petitioner's argument (Pet. Br. 40-45), the fact that Congress has not expressly defined the duties owed by officers and directors of federally chartered depository institutions does not mean that state law is the source of those duties. When Congress enacted the National Bank Act in 1864 and HOLA in 1933, creating national banks and federal savings associations and empowering their officers and directors to manage them, it was firmly established at general common law that those directors and officers would owe a fiduciary duty of care to the institutions, the breach of which would be redressable by the institutions. See *Briggs,* 141 U.S. at 146 ("The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common law rule which renders every agent liable who violates his authority to the damage of his principal."); accord *Leach* v. *FDIC,* 860 F.2d 1266, 1270 (5th Cir.) (citation and footnote omitted) ("Section 93(a) of the National Bank Act as enacted in 1864 was not created in a vacuum. In this pre-*Erie v. Tompkins* era, it was commonly understood that there existed a general common law."), cert. denied, 491 U.S. 905 (1989). Congress not unreasonably left it to the courts, applying common law, to enforce those duties. "It is precisely when," as here, "Congress has not spoken in an area comprising issues substantially related to an established purpose of government operation * * * that *Clearfield* directs federal courts to fill the interstices of federal legislation."

[17] The Court ultimately decided, however, that it was appropriate to incorporate state law as the federal rule of decision in the particular circumstances of that case, which presented "little need for a nationally uniform body of law." *Kimbell Foods,* 440 U.S. at 728-729.

[18] Similarly, in *United States* v. *Standard Oil Co., supra,* the Court concluded that it is a matter of federal law whether the United States may sue a tortfeasor who injured a soldier for funds expended on the solidier's pay and medical costs while the soldier was incapacitated: "Perhaps no relation between the government and a citizen is more distinctively federal in character than that between it and members of its armed forces. * * * [T]he scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority." 332 U.S. at 305-306 (citations and footnote omitted).

Kimbell Foods, 440 U.S. at 727 (citations and internal quotation marks omitted).

B. The Federal Common Law Should Employ The Standard Of Care Enforced By The Chartering Authority—Here The OTS—As The Rule Of Decision In Civil Actions

There is no need in this case for the Court to determine the precise content of the federal common-law standard of liability applicable to officers and directors of federally chartered depository institutions. The court of appeals appropriately remanded the case for the district court to decide that issue in the first instance. In the event that this Court does address the matter, however, in our view federal common law should incorporate the fiduciary standard of care enforced by the federal chartering authority.

It is well-established that "[c]ontroversies directly affecting the operations of" federal programs, "although governed by federal law, do not inevitably require resort to uniform federal rules." *Kimbell Foods*, 440 U.S. at 727-728. Ordinarily, there must be a "significant conflict between some federal policy or interest and the use of state law * * * as a precondition for recognition of a federal rule of decision." *O'Melveny*, 114 S. Ct. at 2055 (citation omitted). There is abundant potential for such a conflict in this case.

1. The minimum degree of care demanded of officers and directors is a matter of policy that requires a careful balance between the need to provide a sanction (and remedy) for corporate mismanagement and the need to attract and retain competent managers. Ordinarily, it is up to each chartering sovereignty to formulate its own policies in that regard (by statute or common law) with respect to those entities operating under its charter. This Court's decision in *Kamen* is instructive in that regard. In that case, the Court deemed it appropriate to incorporate state law in defining the contours of the demand requirement in derivative suits brought under the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.* The Court's decision was motivated in large part by the considerable deference owed, in the absence of any conflicting national policy, to each State's prerogative to fashion rules directly affecting "the allocation of governing powers within the corporation[s]" that operate under its charter. 500 U.S. at 101. Cf. *Burks*, 441 U.S. at 478 (holding that state law should be used as the federal rule governing the power of disinterested directors of mutual funds to terminate derivative suits brought under federal statutes, in part because "[m]utual funds * * * are incorporated pursuant to state, not federal, law"). The Court explained in *Kamen* that "[s]uperimposing a [uniform] rule of universal-demand over the corporate doctrine of these States would clearly upset the balance that they have struck between the power of the individual shareholder and the power of the directors to control corporate litigation." 500 U.S. at 103. Superimposing *state* standards of fiduciary responsibility over standards developed by a *federal* chartering authority would similarly, and equally clearly, "upset the balance" that the federal chartering authority may "str[ike] between the power[s]" of an institution under its charter and that institution's directors and officers.

2. The OTS is authorized, upon notice and an administrative hearing, to assess civil money penalties against and/or remove from office thrift officers and directors for certain breaches of fiduciary duties.[19] In the course of

[19] See 12 U.S.C. 1818(i)(2)(B) (authorizing civil penalty of $25,000 per day for breaches of fiduciary duty that (i) are part of a pattern of misconduct, (ii) cause or are likely to cause more than a minimal loss to the institution, or (iii) result in pecuniary gain to the defendant); 12 U.S.C. 1818(i)(2)(C) (authorizing civil penalty of $1 million per day for breaches of fiduciary duty if the defendant knowingly or recklessly causes substantial loss to

such proceedings, the OTS, applying the ordinary-care standard articulated by this Court in *Briggs*, see *In re Simpson*, OTS Order No. AP 92-123 (Nov. 18, 1992), slip op. 21-22, aff'd, 29 F.3d 1418 (9th Cir. 1994), cert. denied, 115 S. Ct. 1096 (1995),[20] has spoken authori-

the institution); see also 12 U.S.C. 1818(e) (authorizing removal of director or officer for breach of fiduciary duty where breach (i) causes or could cause more than minimal financial loss to the institution, (ii) prejudices the interests of depositors, or (iii) results in financial gain to the defendant, if the breach involves personal dishonesty or demonstrates willful or continuing disregard for the safety and soundness of the institution).

[20] The FHLBB first received express authority, under 12 U.S.C. 1730(g)(1) (1988), to take enforcement action against directors and officers of federally insured depository institutions for breach of fiduciary duty in 1966. Pub. L. No. 89-695, 102(a), 80 Stat. 1039. At that time, there was a general consensus among state and federal courts that the duty of care owed by officers and directors was the ordinary-care standard articulated in *Briggs*. See, *e.g.*, *Neese* v. *Brown*, 405 S.W.2d 577, 581 (Tenn. 1964) ("From our very thorough study of the matter we have concluded that there is no appreciable conflict of opinion among the courts as to the liability of directors[.] * * * [T]he test as to whether or not a director is liable depends upon whether or not he has used reasonable care and diligence in carrying out his duties.") (citing, *inter alia*, *Briggs*, 141 U.S. at 132); accord *Graham* v. *Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963). Absent any evidence that Congress intended otherwise, the statutory term "fiduciary duty" should be construed in accordance with that general understanding. See *Field* v. *Mans*, 116 S. Ct. 437, 443 (1995) ("It is . . . well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'"); see also *id.* at 443 n.9 ("We construe the [statutory] terms * * * to incorporate the general common law * * *, the dominant consensus of common-law jurisdictions, rather than the law of any particular State."). To the extent that issues arise upon judicial review of an enforcement proceeding requiring a further elaboration of the meaning of "fiduciary duty," the reasonable views of the relevant federal regulatory agency should be given "controlling weight." *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813-814 (1995).

tatively respecting the duty of care owed by directors and officers to federal savings associations. See, *e.g.*, *In re Simpson*, slip op. 21-22 (explaining duty of care); *In re O'Keeffe*, OTS Order No. AP 90-661 (Apr. 26, 1990), slip op. 18-23 (explaining duties of loyalty and care).[21] The OTS has explained that, in today's thrift industry, ordinary care requires, among other things,

> selecting, monitoring and evaluating competent management; establishing business strategies and policies; monitoring and assessing the program of business operations; establishing and monitoring adherence to policies and procedures required by statute, regulations and principles of safety and soundness; and making business decisions on the basis of fully informed and meaningful deliberations.

In re Simpson, slip op. 22; *In re O'Keeffe*, slip op. 19-21. Moreover, because thrift "[o]fficers are responsible for the day to day management of the institution," "an 'inside' director, such as [petitioner], generally has greater knowledge of, and direct responsibility for, the management of the institution." *In re Simpson*, slip op. 23.[22]

[21] The OTS has also published substantial informal guidance respecting the duties of officers and directors. See Office of Thrift Supervision, *Statement Concerning the Responsibilities of Directors and Officers of Insured Depository Institutions* (1992); Office of Thrift Supervision, *Regulatory Handbook on Thrift Activities*, Section 140 (1990); Office of Thrift Supervision, *Director Information Guidelines* (1989); see also Federal Home Loan Bank Board, Memorandum R-62, *Accountability of Directors and Officers; Policy Statement*, 52 Fed. Reg. 22,682 (1987).

[22] Compare, *e.g.*, *In re Vasa*, OCC No. AA-EC-94-28, 81 Fed. Res. Bull. No. 12, at 1171 (Oct. 10, 1995) (Federal Reserve Board decision affirming administrative law judge's finding that national bank directors' duty of care requires proper supervision of subordinates, knowledge of banking laws, and constant concern for bank's safety and soundness); *In re Greenberg*, OCC No. AA-EC-90-45, 1991 OCC Enf. Dec. LEXIS 511, at *77-*78 (Oct. 28, 1991) (Federal Reserve Board Decision holding that "fiduciary dut[ies] of officers and directors of federally chartered institutions are determined by federal common law," and observing that, "[g]iven

3. Congress delegated to the OTS the responsibility to provide for the "safe and sound operation" of federal savings associations. 12 U.S.C. 1463(a)(1); *de la Cuesta*, 458 U.S. at 160-163. The courts should respect the policy choices that the OTS has made, expressly or implicitly, in determining the degree of care and the particular duties owed by thrift officers and directors. In cases (like this case) that involve breach of duty claims against directors or officers of federal savings associations, the courts should thus incorporate the fiduciary standards enforced by the OTS as the federal common law rule of decision. The duty of care owed by a director or officer will, in that event, be the same irrespective of whether the issue arises in the context of an administrative proceeding charging a breach of fiduciary duty under Section 1818 or in a private civil action.[23] The alternative favored by petitioner (Pet. Br. 48)—application in private civil actions of state-law standards of liability—would undermine the OTS's ability to implement its own coherent and uniform regulatory policy, contrary to the intent of Congress, which "plainly envisioned that federal savings and loans would be governed by what the [OTS]—not any particular State—deemed to be the 'best practices.'" *de la Cuesta*, 458 U.S. at 161.

II. SECTION 1821(k) DOES NOT SUPPLANT THE FDIC'S RIGHT, AS RECEIVER, TO ASSERT A FEDERALLY CHARTERED INSTITUTION'S FEDERAL COMMON-LAW CLAIMS AGAINST ITS OFFICERS AND DIRECTORS

The starting point for determining the rights of the FDIC as receiver is 12 U.S.C. 1821(d)(2)(A)(i), which provides that "[t]he [FDIC] shall, * * * by operation of law, succeed to * * * all rights, titles, powers, and privileges of the insured depository institution." By force of that provision, "the FDIC as receiver 'steps into the shoes' of [a] failed [insured depository institution], obtaining the rights '*of* the insured depository institution' that existed prior to receivership." *O'Melveny*, 114 S. Ct. at 2054 (quoting *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 585 (1989)).[24] In *O'Melveny*,

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the importance of the banking system, 'officers and directors of banking corporations generally owe a greater duty [of care] than other corporate officers and directors'"), aff'd, *Greenberg* v. *Board of Governors of Federal Reserve System*, 968 F.2d 164 (2d Cir. 1992). See also Office of the Comptroller of the Currency, *The Director's Book* 56 (Aug. 1987) ("The common law holds an individual bank director to a standard of care in performing the job equal to that which a reasonable and prudent person in a like position would exercise in similar circumstances.").

[23] It should make no difference whether the civil claim is pleaded in the language of negligence or that of breach of duty. "[C]ases * * * use negligence and gross negligence as concepts to aid in interpreting the duty owed" to the corporation. *Louisiana World Exposition* v. *Federal Ins. Co.*, 864 F.2d 1147, 1150 (5th Cir. 1989). See 3 Beth Buday & Gail O'Gradney, *Fletcher Cyc. Corp.*, *supra*, § 990, at 696 ("The liability of officers to the corporation for damages caused by negligent or unauthorized acts rests upon the common-law rule which renders every agent liable who violates his or her authority or neglects his or her duty to the damage of the principal."); *e.g.*, *Hess*, 820 F. Supp. at 1366 ("In Utah, the fiduciary duty of care is simply the level of care state law requires a director to exercise in managing corporate affairs. That is the identical standard of ordinary negligence which underlies a claim for negligent mismanagement."); *Smith* v. *Van Gorkom*, 488 A.2d 858, 872-873 (Del. 1985) (treating a claim for breach of fiduciary duty of care under Delaware law as a claim sounding in negligence).

[24] Section 1821(d)(2)(A)(i) clarified, but did not substantively alter, preexisting law. At the time FIRREA was enacted, as now, Section 192 provided, with regard to national banks, that a receiver appointed by the Comptroller is to "take possession of the books, records, and assets of every description of [the] association." 12 U.S.C. 192. Section 1821(d) provided that, when the FDIC served as receiver, it had "all the rights, powers, and privileges now possessed by or hereafter granted by law to a receiver of a national bank." 12 U.S.C. 1821(d) (1988). With regard to federal thrifts, Section 1729 authorized and directed the Federal Savings and Loan Insurance Corporation, as receiver, to "take

this Court stated that Section 1821(d)(2)(A)(i) "places the FDIC in the shoes of [an] insolvent [state-chartered, federally insured depository institution], to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." 114 S. Ct. at 2054. By the same token, in this case, absent any provision of FIRREA that provides otherwise, the FDIC stands in City Federal's shoes and possesses the right to assert City Federal's federal common-law claims against its former officers and directors.

Section 1821(k) unquestionably modifies the rights of the FDIC as receiver with respect to suits against the former officers and directors of failed institutions. Its first sentence provides that "[a] director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by * * * the [FDIC] * * * for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence)." Section 1821(k) thereby ensures the FDIC's ability to assert claims based on gross negligence, regardless of whether the institution would have had the right to assert such claims on its own behalf before its demise. Section 1821(k)'s second sentence (the savings clause) then states that nothing in Section 1821(k) "shall impair or affect any right of the [FDIC] under other applicable law." *Ibid.*

Petitioner argues (Pet. Br. 14-32) that, despite the savings clause, Section 1821(k) creates an exclusive gross-negligence standard of liability for suits by the FDIC as receiver against officers and directors of federally chartered institutions, which supplants the FDIC's right to sue such officers or directors under any more stringent standard of liability (such as simple negligence) that might apply as a matter of federal common law in a suit brought

over the assets" of the association and "liquidate its assets in an orderly manner." 12 U.S.C. 1729(b)(1)(A)(i) and (v) (1988).

by an institution on its own behalf. In his view, Section 1821(k) insulates officers and directors of federally chartered depository institutions from liability to the FDIC under the federal common-law standard that governed their conduct while they were serving as officers and directors and under which they could have been held liable in a suit brought against them by the institution before its demise. That would be an odd result, given Congress's stated desire through FIRREA to strengthen "the enforcement powers of Federal regulators of depository institutions" and "the civil sanctions * * * for defrauding or otherwise damaging depository institutions." Pub. L. No. 101-73, § 101(9)-(10), 103 Stat. 187 (1989).[25] In any event, the text, structure, and legislative history of the statute demonstrate, contrary to petitioner's view, that Section 1821(k) provides the FDIC with the option of pursuing statutory claims for gross negligence, while preserving its ability to assert any other claims that it might possess as receiver.

A. The Text And Structure Of Section 1821(k) Demonstrate That It Does Not Supplant The FDIC's Right To Assert A Federal Institution's Own Federal Common-Law Claims

Petitioner recognizes that Congress is presumed not to have intended through Section 1821(k) to supplant the FDIC's preexisting authority, as receiver, to pursue a federally chartered institution's federal common-law claims. Pet. Br. 15-16. He argues (*ibid.*), however, that, since Section 1821(k) authorizes suit against officers and directors for gross negligence, the statute "speaks directly" to a standard of liability for such officers and directors and thereby supplants any standard otherwise applicable under

[25] See also 135 Cong. Rec. 7155 (1989) (statement by Senator Roth: Section 1821(k) is "surgically designed to protect the Federal interest, the taxpayers' interest, and no other"); *ibid.* (statement by Senator Garn: the purpose of Section 1821(k) is to "protect[] the insurance fund").

federal common law. The "speaks directly" formulation is, in certain circumstances, an appropriate way to conceptualize the inquiry as to whether Congress intended to supplant preexisting common law. See, *e.g.*, *United States* v. *Texas*, 507 U.S. 529, 534 (1993). It is not a mechanism by which to avoid that inquiry altogether. Section 1821(k) plainly authorizes the FDIC to sue officers and directors of federally chartered institutions for gross negligence. The question is whether Section 1821(k) *limits* the FDIC to that remedy, or whether it instead *empowers* the FDIC, at a minimum, to sue for gross negligence, while *preserving* the FDIC's right, in addition, to assert any federal common-law claims to which it may succeed as receiver.

Judging from its text and structure, Section 1821(k) is not a limiting provision. Enacted in reaction to the States' codification of so-called "insulating statutes" that protected officers and directors from suit for all but knowing or intentional misconduct (see pp. 36-41, *infra*), Section 1821(k) is most naturally read as expanding the FDIC's rights by establishing a minimum standard of liability applicable in its suits against officers and directors of failed federally insured institutions: It authorizes suit by the FDIC for gross negligence regardless of whether the institution could itself have asserted a claim for gross negligence. *O'Melveny*, 114 S. Ct. at 2054, while expressly preserving (through its savings clause) the FDIC's right to assert whatever claims the institution could have brought on its own behalf.

1. The first sentence of Section 1821(k) authorizes the FDIC as receiver to recover money damages in a civil action for the "gross negligence, including * * * conduct that demonstrates a greater disregard of a duty of care (than gross negligence)" of an officer or director of a federally insured depository institution. Nothing in the text of that sentence purports to restrict the FDIC from asserting an institution's own claims for ordinary negligence in circumstances where such claims could have been made by the institution on its own behalf. If Congress

had so intended, it could easily have so provided by stating that a director or officer "may be held personally liable * * * *only* for gross negligence * * *" (or "may not be held liable * * * except for gross negligence * * *"). See *FDIC* v. *Canfield*, 967 F.2d 443, 446 (10th Cir.) (en banc) (citing *Rose* v. *Rose*, 481 U.S. 619, 626-627 (1987) ("may" establishes only discretionary power)), cert. dismissed, 506 U.S. 993 (1992); *FDIC v. McSweeney*, 976 F.2d 532, 537 (9th Cir. 1992), cert. denied, 113 S. Ct. 2440 (1993).

Petitioner concedes that Section 1821(k) does not affirmatively state that the FDIC may not sue directors and officers of federally chartered institutions for conduct less culpable than gross negligence, but he argues that the first sentence makes that point by negative implication. In petitioner's view, the authorization to sue based on gross negligence (or conduct that reflects an even greater disregard of a duty of care) implies an absence of authority to sue for violation of "a *lesser* disregard of a duty of care," such as simple negligence. Pet. Br. 18-19.[26] Even in the absence of an express savings clause, that argument would carry little (if any) weight, because Section 1821(k) clearly is not the primary source of the FDIC's authority

[26] More precisely, petitioner's current position appears to be that Section 1821(k) supplants the FDIC's ability to assert a federal depository institution's claims under federal common law, but preserves the FDIC's ability to assert a state-chartered depository institution's claims based on state statutory or common law. Pet. Br. 25 n.12. The difference, petitioner explains, lies in the fact that the presumption against supplanting federal common law is weaker than the presumption against preempting state law. *Id.* at 15 (quoting *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 316-317 (1981)); accord *RTC* v. *Frates*, 52 F.3d 295, 296-297 (10th Cir. 1995). Those presumptions, however, are merely tools for divining the meaning of statutory text. The text of Section 1821(k) affords no basis for treating the FDIC's authority to assert a state-chartered institution's state-law claims any differently from the FDIC's authority to assert a federally chartered institution's federal common-law claims. See also pp. 32-34, *infra* (discussing savings clause).

to pursue civil actions against officers and directors. Instead, the FDIC's authority derives primarily from its long-standing right as receiver, now codified at 12 U.S.C. 1821(d)(2)(A)(i), to succeed to all causes of action possessed by the depository institution. If Congress had intended to bar the FDIC from asserting a federally chartered institution's federal common-law causes of action for ordinary negligence to which the FDIC would otherwise succeed under Section 1821(d)(2)(A)(i), it is extremely doubtful that Congress would have signalled that intent via a negative implication from a positive grant of authority in Section 1821(k). Section 1821(k) is more naturally interpreted as a pure supplement to Section 1821(d)(2)(A)(i): Section 1821(k) permits the FDIC to sue directors and officers for gross negligence even in cases where (because of a state insulating statute) the institution could not itself have asserted a claim for gross negligence.[27]

2. To the extent that Section 1821(k)'s substantive provision leaves any room for doubt, the savings clause makes clear that Congress had no intention to "impair or affect any right of the [FDIC] under other applicable law." 12 U.S.C. 1821(k). That language means what it says: Section 1821(k)'s authorization of suits for gross negligence does not affect the FDIC's right to assert any other claims that it holds as receiver under other applicable law. Petitioner, however, argues that "other applicable law" refers only to other sections of FIRREA and to state statutory and common law. Pet. Br. 19-22.

The question in this case regarding the meaning of "other applicable law" is similar to the issue presented

[27] Contrary to petitioner's view (Pet. Br. 18-19), Section 1821(k)'s specific reference to "conduct that demonstrates a greater disregard of a duty of care (than gross negligence)" adds nothing to his negative-implication argument. The phrase makes clear that Section 1821(k) only empowers the FDIC to sue for gross negligence or more culpable conduct. It does not say that the FDIC may not sue for lesser breaches of duty if empowered to do so by other applicable law.

in *Patterson* v. *Shumate*, 504 U.S. 753 (1992). In that case, a bankruptcy trustee attempted to recover for a debtor's estate the debtor's interest in a pension plan. Section 541(c)(2) of the Bankruptcy Code, however, excludes from the debtor's estate property that is subject to a restriction on transfer under "applicable nonbankruptcy law," 11 U.S.C. 541(c)(2), and the pension plan in *Patterson* contained an anti-alienation provision required for tax qualification under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* The trustee argued that "applicable nonbankruptcy law" referred only to state law. This Court rejected that interpretation. It found the plain meaning of the phrase "applicable nonbankruptcy law" determinative:

> The natural reading of the provision entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law. Nothing in [11 U.S.C.] 541 suggests that the phrase "applicable nonbankruptcy law" refers * * * exclusively to *state* law. The text contains no limitation on "applicable nonbankruptcy law" relating to the source of the law.
>
> * * * * *
>
> * * * Plainly read, the provision encompasses *any relevant nonbankruptcy law*, including federal law such as ERISA.

504 U.S. at 758-759 (emphasis added). Noting that the Bankruptcy Code elsewhere contains several specific references to state law, the Court concluded that "Congress' decision to use the broader phrase 'applicable nonbankruptcy law' in § 541(c)(2) strongly suggest[ed] that it did not intend to restrict the provision in the manner that [the trustee] contend[ed]." *Id.* at 758.

For those same reasons, the phrase "other applicable law" in Section 1821(k) means—as the words strongly suggest—*any* other applicable law, whether state or federal. When Congress intended elsewhere in Section 1821

to refer only to the laws of particular jurisdictions or other provisions of FIRREA, it did so expressly. See, *e.g.*, 12 U.S.C. 1821(c)(3)(B) ("powers imposed by State law"); 12 U.S.C. 1821(e)(3)(C)(ii) ("except as otherwise specifically provided in this section"); 12 U.S.C. 1821(g)(4) ("determined in accordance with the applicable provisions of State law"). As in *Patterson*, the absence of specific limiting terms in Section 1821(k) "strongly suggests that [Congress] did not intend to restrict the provisions" to state law. 504 U.S. at 758.[28]

3. Contrary to petitioner's argument (Pet. Br. 20-21), a literal reading of the savings clause does not rob Section 1821(k)'s substantive provision of its intended meaning.[29] If, as its language provides, the savings clause preserves the FDIC's option to pursue claims based on ordinary negligence (or other culpable conduct) where applicable state or federal law so permits, the substantive provision does significant service by ensuring the FDIC's ability to pursue claims for gross negligence where other applicable law does not so permit. Contrary to petitioner's view (*id.* at 21), there is nothing "nonsensical" in providing the federal receiver with both the guaranteed ability to sue for gross negligence and the option of pursuing claims based on less culpable conduct where "other applicable law" allows.[30]

[28] Nor is the term "other applicable law" reasonably interpreted to refer solely to statutory, as opposed to common, law. See *Norfolk & Western Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991) (the phrase "all other law, including State and municipal law," "does not admit of [a] distinction * * * between positive enactments and common-law rules of liability").

[29] That would be true only if the substantive provision was intended to establish the exclusive standard of liability for officers and directors of federally and state-chartered institutions. If that were its intended meaning, the savings clause would not have been enacted.

[30] Indeed, although petitioner argues that state, rather than federal, law governs suits by federally chartered institutions against their officers and directors, he agrees that Congress afforded the FDIC the ability to pursue claims both under the standard of liability created by Section 1821(k) and under the standard that would have been applicable in a suit brought by the institution in its own right. Pet. Br. 25 n.12 (FDIC may sue "directors and officers for gross negligence even though the applicable state law would otherwise require a higher standard, and * * * sue for simple negligence in those relatively few states that have adopted a simple negligence standard").

It is true that Section 1821(k)'s authorization of suits for gross negligence may not afford the FDIC any practical advantage insofar as federally chartered institutions are concerned, because the FDIC already has the ability to sue officers and directors of federally chartered institutions for negligence under federal common law. Congress's inclusion of officers and directors of federally chartered institutions within the scope of Section 1821(k) (through its use of the broad term "insured depository institution") is reflective, in our view, of Congress's limited aims. As explained below, pp. 36-41, *infra*, Congress's goal was to prevent the States' then-recent enactments of statutes insulating officers and directors from liability from unduly restricting the FDIC's ability to sue the officers and directors of failed federally insured institutions for damages resulting from their dereliction of duty. At the time, the question of what law (state or federal) applied to which institutions was unresolved,[31] and Congress wanted to en-

[31] Most courts concluded that federal common law applied to federally chartered institutions. See p. 14 & n.9, *supra*. Some courts applied state law to federally chartered thrifts, generally without any analysis of whether state law applied directly or as the appropriate rule of decision under federal law. *E.g.*, *Borgsmiller* v. *Burroughs*, 542 N.E.2d 1281 (Ill. App. Ct.), appeal denied, 548 N.E.2d 1066 (Ill. 1989); *First Nat'l Bank* v. *Hall*, 238 S.E.2d 284 (Ga. Ct. App. 1977); *Broadway Fed. Sav. & Loan Ass'n* v. *Howard*, 285 P.2d 61 (Cal. Ct. App. 1955). With regard to state-chartered institutions, some courts applied federal common law on the ground that the institutions were federally insured, *e.g.*, *FSLIC* v. *Sajovich*, 642 F. Supp. 74, 77 (C.D. Cal. 1986); *First Hawaiian Bank* v. *Alexander*, 558 F. Supp. 1128, 1131-1132 (D. Haw. 1983), while others held that state law applied, *e.g.*, *FSLIC* v. *Capozzi*,

sure that, at a minimum, grossly negligent officers and directors who were responsible for savings and loan failures would pay for the costs of their mismanagement. Having provided through Section 1821(k) that the FDIC would always have the option of a suit for gross negligence, Congress left it to the courts to determine what "other * * * law" applying a stricter standard of liability might also be applicable.

B. The Legislative History Confirms That The Purpose Of Section 1821(k) Was To Expand, Not To Contract, The Rights Of The FDIC As Receiver

The legislative history of Section 1821(k) confirms the clear meaning of the text. That history reveals that Congress was concerned about the enactment by numerous States of so-called "insulating statutes." Those statutes shield officers and directors from liability for certain breaches of fiduciary duty.[32] Congress was concerned that such statutes would frustrate the ability of the federal receiver to recover damages from officers and directors of failed federally insured depository institutions for losses resulting from their mismanagement. Contrary to petitioner's argument (Pet. Br. 29), the legislative history reveals no intention on the part of Congress to eliminate,

855 F.2d 1319, 1325-1326 (8th Cir. 1988), vacated on other grounds, 490 U.S. 1062 (1989).

[32] See, *e.g.*, Ind. Code Ann. § 23-1-35-1(e)(2) (Burns 1995) (directors not liable unless conduct amounts to at least "willful misconduct or recklessness"); Fla. Stat. Ann. § 607.0831(5) (West 1993) ("recklessness or an act or omission which was committed in bad faith or with malicious purpose"); Ohio Rev. Code Ann. § 1701.59(D) (Anderson 1992) ("deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation"); Del. Code Ann. tit. 8, § 102(b)(7) (Supp. 1994) (authorizing shareholders to opt out of Delaware's common-law standard by adopting provisions that limit a director's liability to illegal acts or omissions, breaches of the duty of loyalty, or intentional wrongdoing); Cal. Corp. Code § 204(a)(10) (West 1990) (same).

or restrict in any way, the FDIC's right to sue officers and directors of federally chartered depository institutions under federal common law.

Section 1821(k) originated in the Senate. The initial Senate bill provided:

> Notwithstanding any provision of State law, a director or officer of an insured financial institution may be held personally liable for monetary damages in any civil action by * * * [the FDIC] * * * for any cause of action available at common law, including, but not limited to, negligence, gross negligence, willful misconduct, breach of fiduciary duty, breach of contract, conversion, fraud, waste of corporate assets, and violations of statutes.

S. 774, 101st Cong., 1st Sess. § 214(n) (1989). That version of the Senate bill would explicitly have preempted any state statute that restricted in any way the causes of action that were available at common law. The bill was amended by its managers on the Senate floor, however, to limit its preemptive effect. As amended, the bill provided:

> A director or officer of an insured financial institution may be held personally liable for monetary damages in any civil action by * * * [the FDIC] * * * for gross negligence or intentional tortious conduct * * *.

See S. Rep. No. 19, 101st Cong., 1st Sess. 105-106 (1989). At the same time, a savings clause was introduced, which stated:

> Nothing in this paragraph shall impair or affect any right, if any, of the [FDIC] that may have existed immediately prior to the enactment of the FIRRE Act.

Id. at 106.

Senator Riegle, the bill's floor manager, explained the purpose of the provision, and the reason for its amendment, as follows:

> In recent years, many States have enacted legislation that protects directors or officers of companies from damage suits. These "insulating" statutes provide for various amounts of immunity to directors and officers. For example, in Indiana, a director or officer is liable for damages only if his conduct constitutes "willful misconduct or recklessness."
>
> The reported bill totally preempted State law in this area with respect to suits brought by the FDIC against bank directors or officers. However, in light of the State law implications raised by this provision, the managers' amendment scales back the scope of this preemption.
>
> Under the managers' amendment, State law would be overruled only to the extent it forbids the FDIC to bring suit based on "gross negligence" or an "intentional tort."

135 Cong. Rec. 7152-7153 (1989).

Senator Sanford voiced appreciation for the managers' amendment, explaining that the language of the revised bill met his concern that Congress not interfere unduly with legitimate state policies:

> The bill as drafted would have preempted numerous State laws which provided limited indemnification for directors and officers. These State laws were enacted largely in response to problems faced by corporations in attracting good officers and directors. * * *
>
> The amendment which the managers have accepted modifies the bill to preempt State law only in a very limited capacity. The amendment would permit the FDIC to bring an action or direct others to bring an action against the directors and officers of a financial institution if the director or officer acted with gross negligence or committed an intentional tort.
>
> * * * [T]he preemption of State law permitted by this bill is limited solely to those institution [*sic*] that have Federal deposit insurance and to those cases in which the directors or officers have committed intentional torts or acts of gross negligence.

> * * * It is not a wholesale preemption of longstanding principles of corporate governance * * *.

135 Cong. Rec. 7150-7151 (1989). Senator Roth (one of FIRREA's sponsors) clarified the nature of the Senators' federalism concerns: "[S]ection 214(n) as modified does no violence to *State interests in governing corporations they may create.*" *Id.* at 7155 (emphasis added).

Consistent with the views expressed on the Senate floor, the Senate Report provides:

> New section (n) enables the FDIC to pursue claims against directors or officers of insured financial institutions for gross negligence (or negligent conduct that demonstrates a greater disregard of a duty of care than gross negligence) or for intentional tortious conduct. This right supersedes State law limitations that, if applicable, would bar or impede such claims. *This subsection does not prevent the FDIC from pursuing claims under State law or under other applicable Federal law, if such law permits the officers or directors of a financial institution to be sued (1) for violating a lower standard of care, such as simple negligence, or (2) on an alternative theory such as breach of contract or breach of fiduciary duty.*

S. Rep. No. 19, *supra*, at 318 (emphasis added).[33]

[33] Petitioner argues that the Senate Report should be paid little heed because it was not available at the time the Senate voted on the managers' amendment. Pet. Br. 30-31 (citing *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 407 (1987)). Petitioner's reliance on *Clarke* is unavailing. In that case, the legislative history in question was a statement by Representative McFadden that had been placed into the Congressional Record ten days after the McFadden Act was enacted. 479 U.S. at 407. Here, as petitioner concedes (Pet. Br. 31), the Senate Report was available six weeks before Congress enacted FIRREA.

Petitioner also argues (Pet. Br. 31 n.15) that the Senate Report's statement regarding the preservation of the FDIC's rights under "other applicable Federal law" likely encompassed the ad-

The language of the provisions adopted by the Senate was incorporated into the House of Representatives' version of Section 1821(k), except for minor technical changes (principally in the savings clause) made by the House.[34] The House's version was enacted into law without significant debate either in the House or in the Conference Committee. Although petitioner places heavy reliance on the Conference Report (Pet. Br. 29-30), that report does not contradict the Senate Report or otherwise support petitioner's assertion that Congress intended to create an exclusive standard of liability for cases involving officers and directors of federally chartered institutions. It provides:

> Title II preempts State law with respect to claims brought by the FDIC in any capacity against officers or directors of an insured depository institution. The preemption allows the FDIC to pursue claims for gross negligence or any conduct that demonstrates a

ministrative enforcement provisions of FIRREA and other federal statutes, but not federal common law. Because the Senate Report was discussing the provision's effect on the FDIC's ability to pursue civil claims in its capacity as receiver, it is unlikely that the provision's reference to "claims" had anything to do with the FDIC's authority, in its corporate capacity, to bring administrative enforcement actions. We agree that the Senate Report's reference was intended to include, among other things, civil claims against officers and directors under federal statutes, such as the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* In our view, the Report means what it says—Section 1821(k) was not intended to supplant the FDIC's rights under "other applicable Federal law." There is no reason to suppose that the reference to "other applicable Federal law" excludes applicable federal common law.

[34] Whereas the Senate's version of the savings clause used the phrase "any right, if any, of the [FDIC] that may have existed immediately prior to the enactment of the FIRRE Act," S. Rep. No. 19, *supra*, at 106, the language passed by the House and enacted by Congress reads "any right of the [FDIC] under other applicable law," 12 U.S.C. 1821(k). Petitioner concedes that that change in wording has no substantive implications. Pet. App. A17 n.12.

> greater disregard of a duty of care, including intentional tortious conduct.

H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 398 (1989). Just as Section 1821(k) provides that officers and directors "may" be held liable for gross negligence in suits by the FDIC, the Conference Report states that the statute "allows" the FDIC to sue officers and directors for gross negligence. The language of the Conference Report does not support petitioner's argument that the FDIC may *only* sue officers and directors of federally chartered institutions for gross negligence or more culpable conduct.

The legislative history of Section 1821(k) thus confirms the text of the provision: Congress intended to preempt state insulating statutes to ensure that, at a minimum, the FDIC as receiver may sue officers and directors of federally insured depository institutions for their gross negligence. Nothing in the legislative history suggests that Congress intended to limit in any way the FDIC's right to assert any claims against officers and directors to which it succeeds as receiver.[35]

[35] At the time FIRREA was enacted, directors and officers in a number of States were subject to an ordinary-negligence standard of care. See, *e.g.*, *Medford Trust Co.* v. *McKnight*, 197 N.E. 649, 655 (Mass. 1935) (bank directors "are liable for negligence in the performance of those responsibilities even though they have acted in good faith"); *Omnibank of Mantee* v. *United Southern Bank*, 607 So. 2d 76, 84-86 (Miss. 1992) (affirming judgment against bank officer for "negligently extend[ing] credit" to insolvent borrowers); *Neese* v. *Brown*, 405 S.W.2d at 580 ("It is generally held that the liability of the directors and other officers of a corporation is not limited to wilful breaches of trust or excessive power but also extends to negligence."); *FDIC* v. *Berry*, 659 F. Supp. 1475, 1481 (E.D. Tenn. 1987) (bank directors may be held responsible "upon a finding of negligent handling of the bank's affairs").

CONCLUSION

The decision of the Third Circuit should be affirmed.

Respectfully submitted.

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